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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re MICHAEL MONTGOMERY,

on Habeas Corpus.

2d Civil No. B192544
(Super. Ct. No. CR14384)
(San Luis Obispo County)

OPINION ON TRANSFER
FROM SUPREME COURT

In our prior opinion filed November 7, 2007, we affirmed the order of the trial court granting Michael Montgomery's petition for a writ of habeas corpus and the ensuing grant of the relief sought – that he be released on parole despite the Governor's reversal of the order of the Board of Prison Hearings (Board) granting parole. Our Supreme Court granted review. On October 28, 2008, it transferred the matter to this court with directions to vacate our prior decision and to reconsider the cause in light of *In re Lawrence* (2008) 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241. As directed, we have reconsidered the matter. We issue a new opinion again affirming the order of the trial court.

The Governor appeals from a superior court's granting a petition for a writ of habeas corpus filed by Michael Montgomery and ordering that he be released.¹ The

¹ Montgomery was released from custody on or about August 1, 2006, following our Supreme Court's denial of the Governor's petition for writ of supersedeas. Montgomery remains at liberty on parole.

superior court determined that Governor Arnold Schwarzenegger's reversal of the Board's decision finding Montgomery suitable for parole was based solely on the nature of the commitment offense and was not supported by "some evidence." The Attorney General urges us to reverse the superior court's decision, arguing that the nature of the commitment offense provides some evidence supporting the Governor's reversal of the Board's decision.

In his order of June 16, 2005, the Governor relied solely upon the "gravity of the second-degree murder committed by Mr. Montgomery," in concluding that he posed an unreasonable risk to the public's safety. While the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra*, 44 Cal.4th at pp. 1213-1214.) The Governor made no such additional finding.

Accordingly, we affirm the order of the trial court.

FACTUAL AND PROCEDURAL HISTORY

1. The Commitment Offense – Murder in the Second Degree

On November 6, 1985, Montgomery was at the home of a drug dealer and friend, Darrell Haigwood, with another friend, Charles Reed. Haigwood asked Montgomery to kill Edward Recinella, whom Haigwood said was an informant. Montgomery refused. Reed volunteered to do so. Haigwood promised to pay Montgomery \$10,000 to drive Reed to carry out the shooting. Montgomery agreed. The three men briefly discussed a plan to shoot Recinella.

A short time later, Recinella arrived at the house. He was told to go with Montgomery and Reed to collect a drug debt. At some point before reaching their

destination, Recinella asked Montgomery to pull over to the side of the road so he could urinate. All three men exited the car. Montgomery returned to the car; Reed did not. As Recinella urinated, Reed shot and killed him.

After the murder, Reed got back into the car with Montgomery. They drove to the coast and threw the gun into the ocean. They then drove back to Haigwood's house and discussed the successful completion of their plan. Haigwood never paid Montgomery.

Recinella's body was found the next day approximately six feet from Huasna Road in a rural area of Arroyo Grande. The body had three gunshot wounds—one to the rear of the left leg, one to the right hip, and a fatal one through the back of the neck. Because the neck wound contained dry brown grass, it was concluded that Recinella was already on the ground when the fatal shot was fired.

Nineteen months later, Montgomery was detained on an unrelated charge. During a videotaped police interrogation, Montgomery admitted his involvement in Recinella's murder. In his confession, Montgomery said he had refused to shoot the victim himself. Montgomery said Haigwood hired him that evening to drive the car so that Reed could shoot the victim. Montgomery admitted agreeing to drive the car for a payment of \$10,000. Montgomery also admitted he knew that Reed would "take care of" Recinella that evening.

Pursuant to a plea bargain, Montgomery pled guilty to second degree murder. As part of the bargain, Montgomery agreed to testify against Reed and Haigwood. Montgomery received the statutory and indeterminate sentence for second degree murder of 15 years to life. (Pen. Code, § 190, subd. (a).)²

2. History of Parole Hearings

Beginning in 1996, Montgomery had seven parole hearings before the Board found him suitable for release in 2005. We offer a brief summary of the hearings and their results.

² All statutory references are to the Penal Code.

Psychological evaluations from 1991, 1994 and 1996 show that Montgomery had a long history of alcohol and substance abuse. Prior to the commitment offense, Montgomery was arrested several times on alcohol and drug-related charges. Montgomery's record showed he had no other arrests, either as a juvenile or an adult.

The evaluations note that in 1989, Montgomery received a "CDC 115"³ for drinking. He received a second CDC 115 in January 1994 for having a calendar on his wall with bikini-clad girls on motorcycles. Montgomery received no other CDC 115's during his incarceration.

The evaluations indicate that Montgomery participated in Alcoholics Anonymous (AA), completed several educational and self-help programs, and received good work reports from his supervisors.

The psychologist who examined Montgomery in 1991 concluded that Montgomery "manifested genuine responsibility for the crime from the very beginning" and his violence potential appeared to be "low average." The psychologist who examined Montgomery in 1994 concluded that Montgomery's violence potential appeared to be low if he remained sober. The psychologist who examined Montgomery in 1996 concluded: "At the time of [the] offense, violence potential outside a controlled setting was considered to be greater than average, but at present is estimated to have decreased, in that he has gained in maturity, and his alcohol and drug use are currently in remission."

At the 1996 hearing, the Board received a letter from the district attorney's office commending Montgomery for cooperating in the investigation of Haigwood and Reed. The letter stated: "Without his cooperation, this case, in our belief, would have remained unsolved." The district attorney recommended that the Board consider Montgomery suitable for parole and set a date for his release.

The Board found Montgomery would pose an unreasonable risk of danger to society if released and denied parole. It did so because: (1) He willingly participated in the commitment offense and did nothing to contact law enforcement until he was

³ A CDC 115 documents misconduct believed to be a violation of law, which is not minor in nature. (*In re Gray* (2007) 151 Cal.App.4th 379, 389.)

subsequently arrested, (2) he had an unstable social history of alcohol abuse and numerous drunk driving arrests and continued to drive while his license was suspended, (3) he continued to be involved with drugs and the drug culture after the murder, and (4) he had not completed vocational training.

Montgomery's next parole hearing was in 1997. The life prisoner evaluation noted that Montgomery had remained discipline-free and continued to attend AA on a regular basis. The evaluation stated that his vocational instructor and job supervisor reported he was skillful, dependable, and a "model worker." The evaluation noted: "Montgomery continues to have a consistent positive work record which he has maintained since the first available documentation dated 11/11/89." His future plans included living with his father and stepmother, working in construction, and continuing to be active in AA. The evaluation concluded: "Violence potential appears to be low if Montgomery abstains from alcohol, drug use, and is able to establish a positive social support network upon release. . . . Considering the commitment offense, prior record and prison adjustment, this writer believes the prisoner would pose a low degree of threat to the public if released from prison at this time."

The 1997 psychological evaluation noted that Montgomery had not abused substances for many years, currently did not show impulsivity and poor judgment that would put him at increased risk to again develop an abusive pattern, and had gained much insight and matured greatly. The evaluation concluded: "There are no current indicators of a psychological problem that would interfere with successful parole. [¶] . . . He does not show any psychological features that would increase his risk of future violence above that of the normal population. [¶] . . . He is not considered to be at an increased risk for future substance abuse based on his added insight and maturity."

After the 1997 hearing, the Board found Montgomery not suitable for parole because (1) the crime was an execution-style murder and Montgomery was involved in its planning and execution, (2) he had a history of prior drug and alcohol abuse and had antisocial tendencies, and (3) he lacked sufficient programming within the institution.

Additional parole hearings were held in 1999, 2001, 2002 and 2003. The evaluations prepared for those hearings noted Montgomery's continued involvement in AA, his participation in many other self-help programs, and his continued vocational education. The psychologist who evaluated Montgomery in 1999 concluded that Montgomery "presents a very low level of risk inside a controlled setting. There are no mental health indicators that would put him at risk in the general population for increased potential for violence."

Montgomery's life prisoner evaluation for 2001 stated that he admitted lying to himself for years about not knowing the murder was going to happen. The evaluation also noted that Montgomery remained discipline-free, had worked in several vocational programs, and received satisfactory to above-average work reports. The evaluation concluded that Montgomery "would pose a low degree of threat to the public if released from prison at this time, only providing he remain drug and alcohol free. Should he resume drug and/or alcohol usage, this writer believes his degree of threat to the public and himself could be high."

The evaluations prepared for the 2003 hearing contained little new information except to report that Montgomery remained discipline-free, continued to participate in AA and other self-help programs, and continued to receive vocational training. The life prisoner evaluation concluded that "this writer believes Montgomery would probably pose a moderate degree of threat to the public, if released from prison at this time." The 2003 mental health evaluation concluded that Montgomery "poses a low likelihood to become involved in a violent offense if released." (Italics omitted.)

At the 2003 hearing, Montgomery expressed remorse for the crime. He indicated he had job offers when he was released and had applied for acceptance into a sober living facility. The Board commended Montgomery on his progress in prison but denied parole based on the commitment offense and the need to maintain the gains made in prison over an extended period of time.

Each hearing resulted in a denial of parole with the Board finding that Montgomery posed an unreasonable risk of danger. It gave one or more of the following

reasons for denial after each hearing: (1) The crime was carried out in an especially cruel and callous manner, demonstrating an exceptionally callous disregard for human suffering; (2) his previous record indicated an escalating pattern of criminal conduct and failure of previous grants of probation; (3) he had not sufficiently completed self-help and therapy programming, especially those relating to alcohol abuse; (4) a letter from the San Luis Obispo County Sheriff's Department opposed parole; and (5) Montgomery was more knowledgeable about the crime than he admitted and did not confess until he was later arrested for another crime.

Montgomery received another parole hearing in 2004. The life prisoner evaluation stated that Montgomery continued "to display an ability to program positively within a controlled setting and has progressively and consistently attempted to better himself." The evaluation noted that he regularly attended AA meetings, pursued higher educational goals, and had been involved in vocational programs during the entire period of incarceration. He had no history of violent offenses and had engaged in no violent offense while incarcerated. It concluded: "Montgomery does not appear to be a potential violent repeat offender, but this is only if he continues to abstain from all alcohol and drugs. [T]his writer believes that Montgomery would pose a low degree of threat to the public if released from prison at this present time." There is no updated psychological evaluation in the record.

At the 2004 hearing, the Board again commended Montgomery on his progress. The Board noted it had received a letter from Detective Neufeld of the San Luis Obispo County Sheriff's Department, who investigated the commitment offense, stating: "Due to the very nature of his act I do not believe that Mike Montgomery should be released back into society."

Once again the Board denied parole. It concluded that Montgomery presented an unreasonable risk of danger based on (1) the nature of the commitment offense, (2) Montgomery's prior criminal history, (3) the commission of two additional crimes after the commitment offense, and (4) the need for further participation in self-help programs.

3. Petition for Writ of Habeas Corpus

Montgomery filed a petition for writ of habeas corpus requesting that the superior court reverse the Board's decision. On December 15, 2004, the trial court issued a lengthy order granting Montgomery's petition. The court remanded the case to the Board to conduct a new hearing.

4. Hearing after Remand

The hearing after remand was held January 27, 2005. At the hearing, the Board stated that Montgomery's file contained a letter from the district attorney's office indicating "vigorous support for . . . release," a letter from Lieutenant Basti of the San Luis Obispo Sheriff's Department in opposition to parole, and letters from relatives of the murder victim written in 2002, requesting that parole be denied. No updated life prisoner or psychological evaluations are contained in the appellate record.

After this hearing, the Board found Montgomery suitable for parole because he had (1) no juvenile record; (2) enhanced his ability to function within the law upon release through education programs and self-help programs, vocational programs, and institutional job assignments; (3) been involved in AA on a continuous basis since 1990; (4) only two disciplinary infractions while incarcerated; (5) no significant adult criminal history other than the commitment offense; (6) realistic parole plans, including family support and a job offer; (7) shown signs of remorse and indicated he understood the magnitude and nature of the offense and accepted responsibility for the offense; and (8) his psychological evaluations had been positive and indicated a low probability of violence if released.

The Governor reversed the Board's decision, concluding that Montgomery required a longer period of incarceration to protect the public because he had participated in the murder of the victim solely for financial gain and the murder was premeditated.

5. The Second Petition for Writ of Habeas Corpus

Montgomery filed a second petition for writ of habeas corpus in the superior court on July 15, 2005. The superior court again granted the petition, finding

there was insufficient evidence that the commitment offense was more aggravated or violent than that minimally necessary to sustain a conviction for second degree murder.⁴

6. The Governor's Appeals

The Governor filed a notice of appeal and a petition for writ of supersedeas and request for immediate stay of the superior court's order in this court. On July 27, 2006, we granted a temporary stay. We denied the petition and dissolved the temporary stay on August 1, 2006.

The Governor then filed a petition for review and request for stay in the California Supreme Court on August 3, 2006. After initially ordering a temporary stay, the Supreme Court denied the petition for review and ordered its temporary stay dissolved on August 1, 2006.

Montgomery is currently on parole.

7. The Governor's Decision

The Governor's June 16, 2005, decision reversing the Board's grant of parole states in part:

"[Montgomery] has made efforts to address his history of substance-abuse. . . . [H]e has consistently participated in preventative-substance-abuse programming Mr. Montgomery has remained discipline-free since 1994, has improved his vocational skills . . . and has held several skilled institutional jobs. He has . . . participated in self-help and therapy programs Mr. Montgomery's many efforts to improve his likelihood of success upon parole are positive factors supporting his parole. . . . [H]e does have confirmed plans for parole to live at a sober living facility

"Despite some creditable gains in prison, I cannot dismiss the gravity of the horrible crime Mr. Montgomery committed. Although he maintains he never received the \$10,000 he was promised, he clearly committed the murder based on the promise of

⁴ While Montgomery's second petition for writ of habeas corpus was pending, the Board held another parole consideration hearing in January 2006. The Board again found Montgomery suitable for parole. The Governor reversed that decision on June 2, 2006.

money. The record before me indicates that Mr. Montgomery did not have any problems with, or even know, Mr. Recinella. Mr. Montgomery's participation in this brutal and senseless crime was for the sole, despicable purpose of getting paid.

"In addition to the motive for the crime, the facts of the crime itself make this an especially grave second-degree murder. Within minutes of accepting the offer of money to kill Mr. Recinella, Mr. Montgomery and Mr. Reed left the house with the victim to carry out the murder. As planned, Mr. Montgomery did the driving. When Mr. Recinella asked him to stop the car, Mr. Montgomery obliged and pulled over. As he told his 2001 Life Prisoner evaluator, Mr. Montgomery knew that Mr. Recinella was going to be murdered. Mr. Reed [*sic*] was actually in the process of urinating when he was shot three times. According to the probation officer's report, he was hit in the leg, the hip, and the back of the neck. Moreover, evidence from the autopsy supports the theory that Mr. Recinella was lying on the ground when he was shot execution-style in the neck. After the shooting, Mr. Montgomery and his crime partner left Mr. Recinella's dead body on the side of the road and drove off to destroy evidence and to let Mr. Haigwood know that they had successfully completed the crime. This was a cold premeditated murder committed for financial gain, the facts of which go well beyond the minimum necessary for a second-degree murder conviction. The gravity alone of this monstrous murder is sufficient for me to conclude that Mr. Montgomery poses an unreasonable risk to the public's safety. The San Luis Obispo County Sheriff's Office apparently agrees, having opposed Mr. Montgomery's parole in a 2004 letter to the Board based on the 'very nature' of the murder he committed.

"The record before me indicates that Mr. Montgomery now accepts responsibility and is remorseful for Mr. Recinella's murder. He has received positive evaluations from mental-health and correctional professionals in recent years, and has made some commendable gains during his 18-year incarceration. Moreover, I acknowledge past letters of support for Mr. Montgomery from the San Luis Obispo County District Attorney's Office. But the standard by which I am governed is whether I believe Mr. Montgomery would pose an unreasonable risk of danger to society if released

from prison at this time. And after carefully considering the very same factors as the Board is required to consider, I find the gravity of the second-degree murder committed by Mr. Montgomery presently outweighs the positive factors supporting his release."

DISCUSSION

1. Statutory Framework

Our state Constitution provides that gubernatorial review of a parole determination must be made "on the basis of the same factors which the parole authority is required to consider." (Cal. Const., art. V, § 8, subd. (b).)

The Board's parole decisions are governed by section 3041 and Board regulations. (Cal. Code Regs., tit. 15, § 2230 et seq.)⁵ The Board "shall normally set a parole release date" one year prior to the inmate's minimum eligible parole release date and shall set the date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public" (§ 3041, subd. (a); *In re Lawrence, supra*, 44 Cal.4th at p. 1212.) The presumption is that parole *must* be granted unless *public safety* requires a lengthier period of incarceration. (*In re Shaputis, supra*, 44 Cal.4th at pp. 1257-1258.)

Section 3041, subdivision (b) provides a release date must be set "unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual"

Section 2402 of the California Code of Regulations sets forth the various factors to be considered by the Board in carrying out the mandates of the statute. These regulations are designed to guide the Board's assessment of whether the prisoner poses "an unreasonable risk of danger to society if released from prison," and thus, whether he or she is suitable for parole. (Cal. Code Regs., § 2402, subd. (a).) Subdivision (b) directs the Board to consider "[a]ll relevant, reliable information available to the panel . . . in

⁵ Section references to the California Code of Regulations are to title 15.

determining suitability for parole Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability."

The regulation then provides a detailed list of factors tending to show unsuitability⁶ or suitability⁷ for parole. (Cal. Code Regs., § 2402, subs. (c), (d).) The

⁶ California Code of Regulations section 2402, subdivision (c) sets forth six factors tending to show unsuitability for parole, which include:

"(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

"(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

"(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

"(C) The victim was abused, defiled or mutilated during or after the offense.

"(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

"(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

"(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

"(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

"(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

"(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

"(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail."

⁷ California Code of Regulations section 2402, subdivision (d) sets forth nine factors tending to show suitability for parole, which include:

"(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

"(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

specified unsuitability and suitability factors are "general guidelines" only. (*Ibid.*) The Board is expected to consider "[a]ll relevant, reliable information available

Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (*Id.*, § 2402, subd.

(b).) "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (*Id.*, subd. (a).)

The Governor's decision to reverse the Board's grant of parole must "reflect[] due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.)

2. *Standard of Review*

"[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.]" (*In re Lawrence, supra*, 44 Cal.4th at p. 1204.) The Governor "must consider all relevant statutory factors, including those that relate to post-conviction conduct and rehabilitation. [Citation.]" (*Id.*, at p. 1219.)

We review the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, by determining "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence, supra*, 44 Cal.4th at p. 1191.)

"(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.

"(4) Motivation for Crime. The prisoner committed his crime as a result of significant stress in his life, especially if the stress has built over a long period of time.

"(5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome

"(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

"(7) Age. The prisoner's present age reduces the probability of recidivism.

"(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

"(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release."

3. *The Governor's Decision is Not Supported by "Some Evidence"*

In our earlier decision we stated: The question with which we are confronted is when, over time, do the circumstances of the commitment offense diminish in weight so they are no longer sufficient to bar parole. Our Supreme Court has not yet provided clear guidance as to when the immutable facts of the commitment offense, standing alone, cease to be a permissible factor in parole decisions where, as here, an inmate has met or exceeded every suitability factor set forth in the regulations.

Such guidance has now been provided. "As we explain below, an inquiry into whether the offense is more aggravated than the minimum elements necessary to sustain a conviction was not intended by this court to be the exclusive measure of due process, and has proved in practice to be unworkable, leading to arbitrary results. Most importantly, the circumstance that the offense is aggravated does not, in every case, provide evidence that the inmate is a current threat to public safety. Indeed, it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole-it is the implication concerning future dangerousness that derives from the prisoner having committed that crime. Because the parole decision represents a prospective view-essentially a prediction concerning the future-and reflects an uncertain conclusion, rarely (if ever) will the existence of a single isolated fact in the record, evaluated in a vacuum, suffice to support or refute that decision. [¶] Accordingly, we conclude that although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra*, 44 Cal.4th at pp. 1213-1214.)

The Governor's reversal of the Boards grant of parole focuses exclusively on the circumstances of the offense. To the extent that the Governor goes beyond discussing those circumstances, he praises appellant's conduct. Nonetheless, he concludes: "But the standard by which I am governed is whether I believe Mr. Montgomery would pose an unreasonable risk of danger to society if released from prison at this time. And after carefully considering the very same factors as the Board is required to consider, I find the gravity of the second-degree murder committed by Mr. Montgomery presently outweighs the positive factors supporting his release."

Under the standard established by *In re Lawrence* and *In re Shaputis*, the Governor's conclusion is not supported by some evidence that Montgomery is currently dangerous to the public.

4. Remand to the Governor for Further Consideration is Neither Necessary Nor Appropriate

The remaining issue is whether the court should remand to the Governor to reconsider his decision. In a prior decision, we held that when granting habeas corpus relief from the Governor's reversal of a Board decision, the appropriate remedy is to allow the Governor to exercise his discretion to renew his review of the Board decision. (*In re Capistran* (2003) 107 Cal.App.4th 1299, 1307.)

In this instance, however, the Governor has twice reversed the Board's recommendation based upon the same reasoning. To remand for reconsideration to the Governor would "amount to an idle act." (*In re Scott* (2005) 133 Cal.App.4th 573, 603; see also *In re Smith* (2003) 109 Cal.App.4th 489, 507 ["Since we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor in this case would amount to an idle act"].)

DISPOSITION

The order granting Montgomery's petition for writ of habeas corpus is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

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